

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

OFFICE OF COMPLIANCE AND INSPECTION

In Re: Walter W. Armstrong

File No.: FW C07-0293
AAD No.: 11-009/FWE

CONSENT AGREEMENT

A. INTENT & PURPOSE

This Agreement is entered by and between the Rhode Island Department of Environmental Management's Office of Compliance & Inspection (the "RIDEM") and Walter W. Armstrong (the "Respondent"). This Agreement is entered in accordance with Section 42-17.1-2 *et seq.* of the Rhode Island General Laws ("R.I. Gen. Laws") for the purpose of resolving the administrative enforcement action set forth in a Notice of Violation ("NOV") issued to the Respondent by the RIDEM on 14 November 2011.

B. STIPULATED FACTS

- (1) WHEREAS, the property is located at 1 Almy Street, Assessor's Plat 28, Lot 91 in the town of Johnston, Rhode Island (the "Property").
- (2) WHEREAS, the Respondent owns the Property.
- (3) WHEREAS, on 14 November 2011 the RIDEM issued an NOV to the Respondent alleging certain violations of Rhode Island's Freshwater Wetland Act, R.I. Gen. Laws Section 2-1-21 and the RIDEM's *Rules and Regulations for Governing the Administration and Enforcement of the Freshwater Wetlands Act* (the "Freshwater Wetland Regulations") on the Property.
- (4) WHEREAS, the Respondent timely requested an administrative hearing to contest the NOV.
- (5) WHEREAS, Rhode Island Tack Shop, Inc. operates a business on the Property that is engaged in the wholesale and retail sales of horse equipment and boarding of surrogate mares.
- (6) WHEREAS, on 20 November 2013 and 20 December 2013 the RIDEM received documents that demonstrate that Rhode Island Tack Shop, Inc. meets the definition of a farmer as that term is defined in Rhode Island's Freshwater Wetlands Act, R.I. Gen. Laws Section 2-1-21(j).

- (7) WHEREAS, on 23 May 2014 the RIDEM received documents that demonstrate that the work undertaken to repair/replace a section of the stone masonry wall adjacent to Simmons Brook on the Property met the exemption in the RIDEM's Freshwater Wetland Regulations.
- (8) WHEREAS, on 23 June 2014 the RIDEM received plans submitted by Natural Resource Services, Inc. on behalf of the Respondent entitled "Proposed Freshwater Wetland Restoration Plan, Walter Armstrong, DEM NOV C07-0291, Plat 28, Lot 91, 1 Almy Street, Johnston, RI", Sheet 1 of 2, latest revision dated 19 June 2014 and "Wetland Restoration Plan, DEM File C07-0293, 1 Almy Street, A.P. 28, Lot 91, Johnston, RI", Sheet 2 of 2, latest revision date 6 May 2014, both sheets stamped and signed by John D. Andrews on 30 June 2014 (the "Wetland Restoration Plans"). The Wetland Restoration Plans are attached hereto and incorporated herein as Attachment A.
- (9) WHEREAS, the RIDEM has approved the Wetland Restoration Plans.
- (10) WHEREAS, in lieu of proceeding to an administrative adjudicatory hearing on the NOV and to effect a timely and amicable resolution of the NOV, the RIDEM and the Respondent hereby agree that it is in the best interest of the parties and in the public interest to resolve the issues raised in the NOV.
- (11) WHEREAS, the RIDEM finds that this Agreement is a reasonable and fair settlement and adequately protects the public interest in accordance with Rhode Island's Freshwater Wetland Act, R.I. Gen. Laws Section 2-1-21 and the RIDEM's Freshwater Wetland Regulations.

C. AGREEMENT

- (1) JURISDICTION – The RIDEM has jurisdiction over the subject matter of this Agreement and has personal jurisdiction over the Respondent.
- (2) FORCE and EFFECT – This Agreement shall have the full force and effect of a final compliance order issued after a full hearing on the merits pursuant to the Administrative Procedures Act, R.I. Gen. Laws Section 42-35-1 et seq. from which no timely appeal was taken, and which is enforceable in Superior Court in accordance with R.I. Gen. Laws Section 42-17.1-2(21)(v).
- (3) APPLICATION – The provisions of this Agreement shall apply to and be binding upon the RIDEM, the Respondent and his agents, servants, employees, successors, assigns and all persons, firms and corporations acting under, through and for the Respondent in the performance of work relating to or impacting the requirements of this Agreement.
- (4) RECORDING OF AGREEMENT – Within 10 days of the receipt of the fully executed Agreement from the RIDEM, the Respondent shall record this Agreement with the town of Johnston, Rhode Island and shall provide a copy of the recorded Agreement to the RIDEM.

(5) CONDITIONS –

- (a) **By 1 June 2015** the Respondent shall complete the wetland restoration on the Property in accordance with the Wetland Restoration Plans and the requirements below. It is acknowledged that any discrepancy between the Wetland Restoration Plans and the requirements of this Agreement shall be governed by the Agreement.
- (i) If necessary, prior to the commencement of restoration of the freshwater wetlands, a continuous uninterrupted line of staked haybales or silt fence shall be installed between those portions of the wetlands that have been altered without authorization and the undisturbed freshwater wetlands. These soil erosion and sediment controls must be regularly inspected and properly and continually maintained (and replaced, if necessary) during and following the completion of the required wetland restoration, and until such time that all surrounding areas are properly stabilized. At the discretion and direction of the RIDEM, additional soil erosion and sediment controls must be installed on-site, as deemed necessary, to protect any and all freshwater wetlands.
 - (ii) In the area identified on Sheet 1 of the Wetland Restoration Plans as “Area to be restored in accordance with details on Sheet 2 for Duck Pond Area”, the low shrubs shall be installed 6 feet on center, 2 to 3 feet high after planting, throughout the area.
 - (iii) In the area identified on Sheet 1 of the Wetland Restoration Plans as “Aviary “Restoration” all fencing, cages, netting, structures, peastone (crushed stone), and other non-natural (man-made) improvements, aside from the stone lined channels and pool areas, shall be removed to an appropriate upland location, outside of any and all freshwater wetlands. All disturbed surface areas shall be covered with a plantable soil, seeded with a wildlife conservation seed mixture, and stabilized by applying a mat of spread hay mulch. Shrub plants (as specified on the Wetland Restoration Plans) shall be installed 6 feet on center, 3 to 4 feet high after planting throughout the area.
 - (iv) If any or all of the required plantings (including wildlife grasses) fail to survive at least 1 year from the time that planting has been verified by the RIDEM, the Respondent agrees to plant and maintain the same plant species until such time that survival is maintained over 1 full year.
 - (v) Upon stabilization of all disturbed areas, erosion and sedimentation controls must be removed from the freshwater wetland. Prior to the removal of the controls, all accumulated sediment must be removed to a suitable upland area, outside of any and all freshwater wetlands.
 - (vi) All restored wetland areas, including replanted areas, must be allowed to revegetate naturally and revert to a natural wild state. Aside from those improvements allowed within the freshwater wetlands on the Property under this Agreement, no future clearing, mowing, cutting, trimming, or other alterations are allowed in the restored wetland areas, or within other previously

undisturbed freshwater wetlands on Property, without first obtaining a permit from the RIDEM, with the exception of any work allowed as an exempt activity under the RIDEM's Freshwater Wetland Regulations, Rule 6.00.

(b) Penalty – The Respondent shall pay to the RIDEM the sum of Three Thousand Seven Hundred and Fifty Dollars (\$3,750) in administrative penalties assessed as follows:

(i) Upon execution of this Agreement by the Respondent, the Respondent shall pay to the RIDEM the sum of One Thousand Two Hundred Dollars (\$1,200).

(ii) The remainder of the administrative penalty shall be in the form of a Supplemental Environmental Project ("SEP"). The SEP consists of placing a Conservation Easement on a portion of the Property identified as "Proposed Conservation Easement Area" on the Wetland Restoration Plans (the "Conservation Easement SEP"). The Respondent shall be given a credit of Two Thousand Five Hundred and Fifty Dollars (\$2,550) for the Conservation Easement SEP (the "Conservation Easement SEP Credit"). The Conservation Easement SEP shall be completed as follows:

1. Within 30 days of execution of this Agreement, the Respondent shall submit to the RIDEM a metes and bounds survey (plan and written description) of the area that encompasses the Conservation Easement, prepared by a licensed land surveyor (the "Conservation Easement Area").

2. The Conservation Easement Area is subject to the RIDEM's review and approval. Upon review, the RIDEM shall provide written notification either granting formal approval or stating the deficiencies therein. Within 14 days (unless a longer time is specified) of receiving a notification of deficiencies, the Respondent shall submit to the RIDEM a modified Conservation Easement Area to correct the deficiencies.

3. The Conservation Easement shall be executed by the Respondent, in favor of the RIDEM, and shall be in the form attached hereto as Attachment B, and shall be subject to review and approval by the State Properties Committee.

4. Within 14 days of approval of the Conservation Easement by the State Properties Committee, the Respondent shall record the Conservation Easement in the town of Johnston land evidence records and provide a copy of the recorded Conservation Easement to the RIDEM. The recording shall be at the sole expense of the Respondent.

(iii) The amount that the Respondent agrees to pay in this Agreement is payable to and for the benefit of the State of Rhode Island and is not compensation for actual pecuniary loss.

- (iv) All payments shall be in the form of a certified check, cashier's check, or money order, payable to the ***R.I. General Treasurer – Water and Air Protection Account***. All payments shall be delivered to:

Chief, RIDEM Office of Compliance and Inspection
235 Promenade Street
Providence, RI 02908-5767

- (v) If the Respondent fails to timely complete the Conservation Easement SEP, the RIDEM shall notify the Respondent that the RIDEM intends to rescind the credit given for the Conservation Easement SEP. Within 14 days of Respondent's receipt of written notification by the RIDEM that the RIDEM intends to rescind the Conservation Easement SEP Credit, the Respondent shall either complete the Conservation Easement SEP or demonstrate that good cause exists for the delay in completing the Conservation Easement SEP. If the Respondent fails to complete the Conservation Easement SEP or does not demonstrate good cause for the delay within said 14 days, the Respondent shall, within 10 days of the Respondent's receipt of a written notification from the RIDEM, submit to the RIDEM a check in the amount of the Conservation Easement SEP Credit after which the Respondent shall be under no further obligation to complete the Conservation Easement SEP.
- (vi) If the State Properties Committee does not approve the Conservation Easement as proposed or a revised version that is mutually agreeable to Respondent and the RIDEM, within 30 days of receipt in writing from the RIDEM that the State Properties Committee did not approve the Conservation Easement and will not approve a revised version, the Respondent shall either propose another SEP to the RIDEM for consideration (the "New SEP Proposal") or pay the amount of the Conservation Easement SEP Credit and be under no further obligation to complete a SEP.
- (vii) The New SEP Proposal is subject to the RIDEM's review and approval. Upon review, the RIDEM shall provide written notification either granting formal approval or stating the deficiencies therein. Within 14 days (unless a longer time is specified) of receiving a notification of deficiencies, the Respondent shall submit to the RIDEM a revised New SEP Proposal to correct the deficiencies (the "Revised New SEP Proposal").
- (viii) If the Respondent fails to timely submit a Revised New SEP Proposal as described in Sections C(5)(b)(vi) and (vii) above, the Respondent shall, within 10 days of the Respondent's receipt of a written notification from the RIDEM, pay the amount of the Conservation Easement SEP Credit and be under no further obligation to complete a SEP.

- (6) RIGHT OF ACCESS – The Respondent shall provide to the RIDEM, its authorized officers, employees and representatives an irrevocable right of access to the Property at all reasonable times for the purpose of monitoring compliance with this Agreement. The Respondent shall ensure that assignees, successors in interest, lessees, sublessees, tenants in possession and/or occupants of the Property shall provide the same access and cooperation as long as they control the Property. The Respondent shall provide a copy of this Agreement to any current lessee, sublessee, tenant in possession and/or occupant of the Property as of the effective date of this Agreement. Any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property shall include this right of access provision and shall otherwise be consistent with the terms of this Agreement.

D. COMPLIANCE

- (1) EFFECT OF COMPLIANCE – Compliance with and fulfillment of this Agreement shall be deemed to resolve all issues raised in NOV. Upon the Respondent’s successful completion of all requirements set forth in this Agreement, the RIDEM shall issue a Release and Discharge of the NOV and the Agreement to the Respondent for recording. The recordings shall be at the sole expense of the Respondent.
- (2) FAILURE TO COMPLY – In the event that the Respondent fails to comply with any of the items specified in Section C (5)(a) of this Agreement, the RIDEM shall give written notice to the Respondent of such alleged non-compliance. Unless a longer period is allowed by the RIDEM, the Respondent shall have 30 calendar days from the date such notice is received to cure the alleged non-compliance. If the Respondent fails to cure the alleged non-compliance within the cure period, the Respondent shall pay a stipulated penalty of Five Hundred Dollars (\$500) per month for each and every month following the cure period during which the noncompliance continues. The RIDEM may, for good cause shown, defer or reduce such penalty. The RIDEM shall not impose such stipulated penalties for acts or omissions beyond the Respondent’s control. The payment of a penalty in accordance with this paragraph shall not preclude the RIDEM from seeking any other appropriate remedy (e.g., injunctive relief in Superior Court).
- (3) COMPLIANCE WITH OTHER APPLICABLE LAWS – Compliance with the terms of this Agreement does not relieve the Respondent of any obligation to comply with any other applicable laws or regulations administered by, through or for the RIDEM or any other governmental entity.
- (4) ADDITIONAL ENFORCEMENT ACTIONS – Upon a determination by the Director that there is a threat to the public health or the environment, or upon discovery of any new information, the RIDEM reserves the right to take additional enforcement actions as provided by law or regulation, including, but not limited to, the issuance of “Immediate Compliance Orders” as authorized by R.I. Gen. Laws Section 42-17.1-2(21). This Agreement shall not restrict any right to hearing or other right available by statute or regulation that the Respondent may have regarding any new enforcement action commenced by the RIDEM after the execution of this Agreement.

- (5) FUTURE ACTIVITIES AND UNKNOWN CONDITIONS – This Agreement shall not operate to shield the Respondent from liability arising from future activities, as of the date of execution of this Agreement.
- (6) SCOPE OF THE AGREEMENT – The scope of the Agreement is only violations alleged in the NOV.
- (7) NOTICE AND COMMUNICATION – Communications regarding this Agreement shall be directed to:

David E. Chopy, Chief
RIDEM Office of Compliance and Inspection
235 Promenade Street
Providence, RI 02908-5767
(401) 222-1360 ext. 7400

Joseph J. LoBianco, Esquire
RIDEM Office of Legal Services
235 Promenade Street, 4TH Floor
Providence, RI 02908-5767
(401) 222-6607

Mary B. Shekarchi, Esquire
33 College Hill Road, Suite 15-E
Warwick, RI 02886
(401) 828-5030

- (a) At any time prior to full compliance with the terms of this Agreement, the Respondent agrees to notify the RIDEM in writing of any change in ownership of the Property, and provide the name and address of the new owner(s). Notice of any change in address/telephone/fax of either party shall be sent to all other parties by certified mail.
 - (b) All communications regarding compliance with this Agreement shall be forwarded to the above-referenced addressees by certified mail.
- (8) DEFERRAL – The Director may, for good cause shown, defer any of the compliance dates prescribed herein. Good cause for deferral of any compliance date shall be forwarded to the RIDEM in writing at least 10 days prior to the prescribed deadline.
 - (9) AMENDMENT – The Agreement may be amended by mutual agreement of the parties in writing.
 - (10) EFFECTIVE DATE – This Agreement shall be deemed entered as of the date of execution by all parties.

IN WITNESS WHEREOF, the undersigned consent to this Agreement in substance and in form.

For the Respondent:

By: _____ (Print Name)

Dated: _____

STATE OF RHODE ISLAND
COUNTY OF _____

In _____, in said County and State, on this _____ day of _____, 2014, before me personally appeared Walter W. Armstrong to me known and known by me to be the party executing the foregoing instrument and he acknowledged said instrument and the execution thereof, to be his free act and deed.

Notary Public
My Commission Expires: _____

For the State of Rhode Island Department of
Environmental Management

David E. Chopy, Chief
Office of Compliance and Inspection

Dated: _____